BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL L. KNAVEL Claimant	)	
VS.	)	
WHITAKER CONSTRUCTION, INC. Respondent	)	Docket No. 1,040,744
AND	)	
PHOENIX INSURANCE COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 12, 2012, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on July 20, 2012. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant failed to sustain his burden of proof of personal injury by accident on March 12, 2008, that arose out of and in the course of his employment. The ALJ further found that claimant failed to provide respondent with timely notice of a claimed accident.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues he suffered personal injury by accident on March 12, 2008, that arose out of and in the course of his employment. He contends he gave respondent timely notice of his accident. Further, claimant asserts he is permanently and totally disabled. If the Board finds he is not permanently and totally disabled, claimant contends he should be awarded a permanent partial work disability of 91.665 percent.

Respondent argues that claimant failed to carry his burden of proof that he suffered a personal injury by accident that arose out of and in the course of his employment. Further, respondent contends claimant failed to provide it with timely notice of his alleged accident. In the event the Board finds the claim compensable, respondent asserts that claimant is not permanently, totally disabled and instead asks the Board to find that claimant has a 5 percent whole body impairment. Respondent argues any work disability should be based upon a 61.15 percent wage loss and a 0 percent task loss.

The issues for the Board's review are:

(1) Did claimant suffer a personal injury by accident on March 12, 2008? If so, did the accident arise out of and in the course of his employment with respondent?

(2) Did claimant give respondent timely notice of his accident?

(3) What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant was 32 years old at the time of his alleged work-related injury. He began working for respondent on June 4, 2007. Curt and Sandra Whitaker are co-owners of Whitaker Companies, Inc. Whitaker Construction and Whitaker Aggregate are subsidiaries of Whitaker Companies, Inc. Although claimant was employed by Whitaker Companies, Inc., respondent in this case is listed as Whitaker Construction, Inc. Respondent's primary business is as a contractor operating in two cement plants and five rock quarries. It is also engaged in farming and ranching. Claimant was hired to load trucks with crushed rock using an excavator. He also did some dozer work, drove 50-ton dump trucks, and worked out of the shop. Claimant testified that on the morning of March 12, 2008, he was working in the shop on respondent's farm because the cement plants in Humboldt and Chanute had shut down. Claimant said he and two other employees were lifting 40-foot lengths of pipes to be cut into corner posts. Claimant said the pipes were about 6 inches in diameter, 1/2 inch thick, and weighed over 100 pounds. Claimant said on March 12, 2008, he helped lift about 30 pipes.

Claimant said that during the lunch break on March 12, 2008, he had to go to a safety meeting. After the meeting, claimant's supervisor, Gene Laver, drove claimant and another employee, Fred McGinnis, to Chanute to work the rest of the day. Claimant said that about a mile or two after leaving the break shack, he asked Mr. Laver to pull over to the side of the road so he could readjust himself in his seat. Claimant testified he told Mr. Laver that his back was hurting, and Mr. Laver told him to get his back checked out and that Mr. Laver would tell Mrs. Whitaker about it. At claimant's evidentiary deposition on September 26, 2008, claimant testified:

Q. [respondent's attorney] Did you tell Mr. Laver that you had injured yourself the morning of March 12, 2008?

A. [claimant] I might have mentioned something.

Q. Okay. Do you recall mentioning something?

A. I can't really say if I did or didn't.[1]

. . . .

Q. When is the first time that you told Mr. Gene Laver that you had injured your back at work at Whitaker Construction?

A. If I did it would have been on the 12th.

Q. And if you didn't tell him on the 12th, does that mean you never told him any other time?

A. I believe so.[2]

At the preliminary hearing held March 18, 2009, claimant testified that he believed he specifically told Mr. Laver he had been injured lifting the pipe while in the truck, and that Mr. Laver said he would let Mrs. Whitaker know. At the regular hearing on July 6, 2010, on direct examination, claimant testified he told Mr. Laver to pull over because his back was hurting and that he had hurt his back lifting pipe.[3] Later, on cross-examination, claimant said he could not remember if he told Mr. Laver that he had suffered an injury while working.[4]

At all three times claimant gave testimony in this case, he stated that on March 17, 2008, five days after his accident, he reported his work-related accident and injury to Mrs. Whitaker. He said Mrs. Whitaker said he probably had pulled a muscle. Claimant did not fill out any paperwork and did not ask to see a doctor. Claimant admitted he never told Curt Whitaker that he suffered an injury to his low back while performing duties at work. Claimant continued to work at respondent. He mentioned his back problems to Mrs. Whitaker three or four times after March 17, 2008, but at none of those times did he ask to see a doctor. On May 12, 2008, however, Mrs. Whitaker sent claimant to see a chiropractor, Dr. Nathan Falk. Claimant saw Dr. Falk on May 12 and May 13, but received no relief from his symptoms.

On June 8, 2008, claimant was working on an excavator when his back pain became bad enough that he left work and went to the emergency room at Allen County Hospital. Before leaving work, he called Mr. Laver to tell him, and Mr. Laver told him not to go back to work until he had spoken with Mr. Whitaker. Later that day or the next day, claimant spoke with Mr. Whitaker, and Mr. Whitaker told him respondent did not need him

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[1] Knavel Depo. at 31-32.

[2] Knavel Depo. at 36.

[3] R.H. Trans. at 15.

[4] *Id.* at 35.

anymore and that he was being laid off. Claimant has not worked since June 8, 2008. He has not looked for work since he was terminated, saying he did not know what work he could perform within his restrictions.

Claimant said when he was at the hospital on June 8, the doctor told him to follow up with his personal physician, so claimant saw Dr. Timothy Spears on June 16, 2008. Claimant said that although Dr. Spears did not take him off work completely, he gave him some restrictions in bending and lifting.

Claimant testified he had good and bad days. On a bad day, he just lays on a couch because he cannot move. On a good day, he feels well enough to mow his yard, but when he is finished mowing his back will hurt. Claimant said about once a week his pain is bad enough he just about goes to the hospital, and about once a week he has a good day. There are very few days claimant has no pain at all. Claimant uses a pain patch for his back symptoms, which is prescribed by Dr. Spears.

Curt Whitaker testified that claimant worked out of the Humboldt office and that Mr. Laver is in charge of the day-to-day interaction with employees. Mr. Whitaker testified that when the cement plants went on shutdown, he would have some of his employees continue to work building corner posts in an effort to keep them busy and employed. He said the pipe used for that is a four-inch pipe for the uprights and two-inch pipe for the cross pieces. Mr. Whitaker said the pipes are not heavy and he is able to pick them up himself.

Mr. Whitaker believed that claimant was not building pipes on March 12, 2008, because the time sheets claimant filled out showed that on March 12, 2008, claimant was driving truck No. 6 at Ash Grove Cement. If claimant had been doing pipe work, his time sheet would probably have said shop maintenance and the customer number would have been 5008 or 9905. Mr. Whitaker said he looked through claimant's time sheets and found some from January 13 to 19, 2008, in which claimant may have been working on pipe. The rest of claimant's time sheets showed he was working at Ash Grove Cement. Mr. Whitaker admitted that it has been a challenge to get employees to put enough detail on the time sheets.

Mr. Whitaker acknowledged that claimant was sent to Dr. Falk for treatment. He testified:

> In the past if I've had an employee claim that they've had a back injury, due to what work comp rates are, a lot of times I'll send them at my own expense, and most of the times it might be an adjustment if they've stepped wrong, picked up

> wrong. Not saying that any of this happened on or off the job, but a lot of times a 30, $40 chiropractor visit is a lot easier just to end it right then.[5]

Mr. Whitaker said he sends his workers to a chiropractor at times so his workers compensation insurance rates do not go up. He said his wife was the one who made the decision to send claimant to a chiropractor. The reason they opted to send claimant to the chiropractor was because claimant could not prove an accurate date of accident and had failed to perform respondent's policy to report an accident immediately. Mr. Whitaker said the first time he became aware claimant was claiming a back injury would have been on May 12, 2008, when claimant was sent to the chiropractor. Before then, he had never spoken with claimant about being injured on the job and no other employee told him claimant had injured his back on the job.

Sandra Whitaker testified she is vice president of respondent and is involved in the hiring and human resources processes, such as workers compensation, health and safety. She said respondent has a policy that all accidents, no matter how minor, must be immediately reported to a supervisor. All employees are given a copy of respondent's policies.

Mrs. Whitaker explained that employees fill out time sheets, which are then turned into payroll for payment. The time sheets are also used to bill their customers for respondent's employees' time. Claimant's time sheet for the week of March 9, 2008, to March 15, 2008, shows that claimant worked at Ash Grove Cement that week. The time sheet also shows claimant was driving a 50-ton haul truck and was stripping dirt. There is no indication on the time sheet that claimant worked any place that week other than Ash Grove Cement, and specifically it does not show that claimant worked at the farm. The time sheet is the only existing record of where claimant worked the week of March 9 to 15, 2008.

Mrs. Whitaker testified that on May 12, 2008, claimant came by her office complaining of back pain. He did not say he had been injured due to lifting at the farm. Mrs. Whitaker said claimant was very vague about his back pain. Claimant told her he did not have health insurance. Claimant had waived health insurance when he was initially employed and although she had given him an application upon request earlier, he had never filled it out and returned it to her. On May 12, 2008, Mrs. Whitaker filled out what information she could on an application for health insurance for claimant and gave the form to Mr. Laver so claimant could complete it. However, claimant never returned a completed application.

Mrs. Whitaker specifically stated that claimant did not tell her, on either March 12 or anytime until May 12, 2008, that he had a back injury or was suffering from back pain.

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[5] Curt Whitaker Depo. at 21.

She would not forget if claimant had reported a workers compensation claim with back pain. Nor did Mr. Laver report to Mrs. Whitaker that claimant had a back injury or back pain. The first time Mrs. Whitaker was aware that claimant was alleging a work injury was on June 24, 2008, when respondent received claimant's Written Claim for Compensation.

Mrs. Whitaker said on June 9, 2008, she saw claimant operating a tractor. This was during the time claimant was telling respondent he could not work because his back was hurt. Mrs. Whitaker has also witnessed him working in his yard.

Gene Laver works for respondent as a supervisor and reports directly to Mr. Whitaker. Mr. Laver remembered a time when he, Mr. McGinnis and claimant left a safety meeting and were traveling to Chanute to work. About a mile away from the break shack, claimant said he had a catch in his back. Mr. Laver said claimant got out of the truck, twisted a few times, got back in the truck, and they proceeded on to Chanute. Claimant did not indicate the cause of the catch in his back and never indicated it was due to work at respondent. Mr. Laver could not remember the date claimant asked him to pull over because of his back. Mr. Laver testified that at no time did claimant ever complain to him of any work injury. Claimant never said anything to Mr. Laver about any back injuries.

Mr. Laver knew claimant had been terminated sometime around the first of June 2008. Since June 2008, he has witnessed claimant performing physical or demanding work. He saw claimant on a tractor digging post holes in his front yard. He saw claimant mowing hay. And he has seen claimant perform general clean-up. Mr. Laver did not stop and watch claimant perform any tasks for any extended period of time but saw him as he drove by claimant's residence.

Michael Oude Alink is a private investigator hired by respondent to conduct surveillance on claimant. He spent five days of surveillance on this assignment. He prepared a report, typing it into a laptop computer at the time of the surveillance or shortly after. The surveillance video was obtained on July 17, 21, and 24, 2010. In his surveillance, Mr. Oude Alink noted that claimant arrived at Ray's Recycling & Auto Salvage (Ray's) at about the same time on July 17, 21 and 24, around 8 to 8:30 a.m.

On July 17, 2010, Mr. Oude Alink observed claimant pull into Ray's, pull to the rear of the building, and come out again about a half hour later. On July 21, claimant arrived at Ray's at 7:58 a.m. and left at 9:30 a.m. He was observed bending down at the waist to pick up a can. Claimant was seen with another heavy object but Mr. Oude Alink did not know what the object was. On July 24, claimant arrived at Ray's at 7:51 a.m. and stayed until 3:21 p.m. He was seen climbing onto some equipment, climbing into a forklift, driving the forklift, bending over at the waist several times, shoveling some objects on the ground, squatting and lifting. July 24, 2010, was the last time Mr. Oude Alink conducted surveillance on claimant. Mr. Oude Alink called Ray's and asked for claimant, but he was told that claimant was not an employee. He never saw claimant helping any customers.

Mr. Oude Alink saw other people at Ray's but could not identify whether they were employees, although he saw some of them operating the forklift.

Based on Mr. Oude Alink's observations, he concluded that claimant was working at Ray's. Mr. Oude Alink had no other information to support the conclusion other than what is seen in the video. Mr. Oude Alink also said claimant was walking without a limp, walking without being hunched over, and appeared to be walking without pain.

Claimant testified he is familiar with Ray's, but he does not work there. Claimant says he takes some pieces of aluminum to Ray's, and the owner lets him clean the aluminum. Once claimant cleans the aluminum, he sells it to Ray's. If he cleans the aluminum, he can get more for it. Claimant gets the aluminum from his house. Some of it is aluminum scrap and pieces of pipe. Claimant said he has also gone to Ray's and looked for parts he was needing for a vehicle. It has been stipulated by the parties that Ray's has paid claimant a total of $13,242.53 for scrap metal between the dates of May 2, 2008, and December 14, 2010.

Dr. Joseph Galate is board certified in physiatry and pain management. He conducted an independent medical evaluation of claimant on January 14, 2009, at the request of respondent. On that date, claimant was 34 years old and stated he had been initially injured on March 12, 2008. He denied any particular incident that day that aggravated him. He stated that several days before he was bending over picking up some cast iron pipe. Since then, he has had a dull, achy pain across his lower back.

Dr. Galate reviewed the MRI report of July 18, 2008, which showed claimant had degenerative changes with disc space narrowing at L5-S1 with a bulging disc. He did not have a herniated disc. There were no significant facet abnormalities. There were mild degenerative changes at L5-S1 and L4-5. Claimant had a hemangioma within the vertebral body of L2.

Claimant returned to Dr. Galate on July 20, 2009, at which time he underwent a lumbar epidural steroid injection. Claimant returned again on August 3, 2009, and stated he had not received any significant relief following the injection. Dr. Galate again performed a physical examination. He said claimant appeared to have more pain across his back and nonradiating down his legs.[6] At that time, Dr. Galate recommended diagnostic therapeutic facet injections, which were given on August 6, 2009. Dr. Galate saw claimant again about a month later, and claimant said he had not received any diagnostic or therapeutic response following the facet injections. The physical therapist felt claimant had maximized therapy and was meeting return-to-work requirements of medium category, lifting up to 50 pounds. After performing another physical examination, Dr.

[6] Initially claimant complained of pain in his legs, but towards the end of treatment claimant was just complaining of back pain.

Galate did not believe any further aggressive treatment was indicated. He tried to get claimant into a work conditioning program, but claimant did not attend the sessions. Dr. Galate therefore recommended claimant have a functional capacity examination (FCE). Claimant returned again on September 17, 2009. Claimant had completed the FCE, and the therapist felt claimant was meeting the requirements, including the ability to lift up to 50 pounds, to return to his job. The FCE's findings showed claimant should have minimal (occasionally) bending, stooping and squatting. He could occasionally crawl, climb stairs and crouch. He could frequently kneel and balance. He could push and pull over 106 pounds. And his chair to floor lift was 47.8 pounds. Dr. Galate returned claimant to full duty work status. He scheduled claimant for a follow up on October 15, 2009, at which time, Dr. Galate released him from treatment for normal duties. He did not impose any permanent restrictions on claimant.

Based on the AMA *Guides*,[7] Dr. Galate placed claimant in DRE Category II for a 5 percent permanent partial impairment to the whole body. Dr. Galate reviewed the list prepared by Steve Benjamin that included 39 nonduplicated tasks. He circled 29 tasks that he believes claimant has the ability to perform. However, Dr. Galate would not comment on any job task that required lifting over 50 pounds and refused to offer an opinion on claimant's task loss.

Dr. Lynn Curtis, who is board certified in physical medicine and rehabilitation, saw claimant on two occasions, both at the request of claimant's attorney. On the first visit, September 3, 2008, claimant gave him a history of his accident, saying on March 12, 2008, he and two others were lifting pipes that were 40 feet long, 6 inches in diameter, and weighed from 700 to 800 pounds. He said after the lifting, he traveled to Chanute and had to have the truck pull over because of back spasms. Claimant said the spasms did not go away, he saw a chiropractor in May 2008, and he went to the emergency room because of the spasms on June 8, 2008. After his examination, Dr. Curtis concluded claimant suffered a lifting injury on March 12, 2008, that involved his neck, mid back and low back. Claimant had clonus at the right ankle and left ankle, which Dr. Curtis said was suggestive of myelopathy. Dr. Curtis diagnosed claimant with lumbar radiculopathy and a possible thoracic myelopathy and cervical strain.

Dr. Curtis examined claimant again on November 24, 2009. Since his last examination, claimant had consulted with Dr. Amundson and had been released by Dr. Galate with no restrictions. Claimant told him Dr. Amundson had recommended a fusion in the future. Claimant had an MRI on June 16, 2009, and two sets of epidurals. Dr. Curtis reviewed the MRI films of June 16, 2009, and July 18, 2008. Dr. Curtis said both MRI reports show the same diagnosis; the disc in question was L5-S1. There was no herniation of any disc. The MRIs showed degenerative and endplate edema, which is an

[7] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

inflammatory component around the disc without herniation. Dr. Curtis said claimant's clonus had resolved. Dr. Curtis stated claimant had lumbar radiculopathy, a compression of the S1 nerve root around the disc. The myopathy or edema of the spinal cord had gone away. Dr. Curtis said claimant also had a cervical neck sprain and thoracic back injury.

Using the AMA *Guides*, Dr. Curtis rated claimant as having a 30 percent impairment to his whole body using the range of motion model, and attributed the entire impairment to claimant's work-related injury of March 12, 2008.

Dr. Curtis said claimant was in the sedentary level for work. Dr. Curtis said under the sedentary category, lifting is restricted to 5 to 10 pounds. He recommended claimant seldom stoop and do no crawling or climbing. Claimant should wear a brace at work. Dr. Curtis reviewed the task list prepared by Richard Santner. Of the 18 tasks on the list, Dr. Curtis opined that claimant would be unable to perform 15 for an 83.33 percent task loss.

Richard Santner, a vocational rehabilitation counselor, initially saw claimant on January 27, 2010, for a vocational assessment for the Kansas Department of Social and Rehabilitation Services. He saw claimant a second time on August 17, 2010, at the request of claimant's attorney, specifically in regard to his workers compensation claim. Mr. Santner prepared a list of 18 tasks that claimant had performed in the 15-year period before his March 12, 2008, accident. Claimant did not mention lifting pipe or building fence as a task when setting out the tasks he performed at respondent. Nor did he mention driving trucks or attending safety meetings. Claimant mentioned to Mr. Santner that he was supervising employees but that is not on the task list.

Based on Dr. Curtis' restrictions, claimant's educational background, training and experience, Mr. Santner did not think claimant would be employable. Even with re-education and retraining, it would be difficult to place claimant considering Dr. Curtis' work restrictions. At the time of his interview with claimant on August 17, 2010, claimant's only source of income was from the sale of some cattle, which Mr. Santner believed claimant partially owned with his parents. Claimant was not engaging in substantial, gainful employment by selling cattle.

The restriction that would most prevent claimant from finding a job would be Dr. Curtis' recommendation that claimant's sitting/standing be limited to 20 minutes. If not for that restriction, Mr. Santner believed claimant would be capable of substantial, gainful employment. Mr. Santner acknowledged that claimant sat in his office for an hour and did not have any apparent problem. Mr. Santner said claimant would be capable of substantial and gainful employment based on Dr. Galate's not having placed any permanent restrictions on him.

Steve Benjamin, a vocational rehabilitation consultant, met with claimant on September 24, 2010, at the request of respondent. He compiled a list of 39 nonduplicative job tasks claimant performed in the 15-year period before his work injury. Claimant told

him that after his departure from respondent, he did not apply for work at any other employer. He had not registered with any workforce center or agency to help him obtain employment. Claimant said he had applied for social security disability on two occasions.

Based on Dr. Galate's lack of restrictions, Mr. Benjamin opined that claimant should be able to return to work to his time-of-injury job or a similar job. In referencing Dr. Curtis' restrictions, claimant is limited to sedentary work, which claimant has no experience performing. So claimant would have to start at an entry-level wage and probably would not make more than minimum wage. Regardless of the restrictions of Dr. Curtis, Mr. Benjamin believed claimant would be able to re-enter the open labor market and perform substantial and gainful activity.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which

[8] K.S.A. 2007 Supp. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[10] *Id.* at 278.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[11]

In *Wardlow*[12], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

ANALYSIS

Although claimant testified he was injured at work over the course of the morning's activities on March 12, 2008, he alleges a specific accident on a specific date, not a series of accidents.[13] Claimant testified that he injured his back by lifting pipe on March 12, 2008. Respondent's time record for that date does not support claimant's allegation. It shows claimant was driving a truck. It does not show claimant was working in the shop on respondent's farm, where claimant said he was lifting pipe.

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[11] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[12] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[13] On claimant's Form K-WC E-1, Application for Hearing, filed June 24, 2008, he claimed an injury to his "back & associated body parts" on "3-12-08" while "[l]ifting in course of work."

Claimant testified he told his supervisor, Mr. Laver, that same day that he injured himself working the morning of March 12, 2008. Mr. Laver disputes this. Claimant testified he told the co-owner, Mrs. Whitaker, of his injury within a week of his alleged accident. Mrs. Whitaker denies claimant related his back symptoms to work. Claimant admits he did not ask either Mr. Laver or Mr. Whitaker to complete an accident report form, nor did he ask to see a doctor within 10 days of his alleged accident. Claimant first sought medical treatment on May 12, 2008, two months after the alleged date of accident. Although Mrs. Whitaker suggested claimant seek treatment with Dr. Falk on May 12, 2008, she testified claimant had not told her his back complaints were work related. Mr. Whitaker's testimony, however, suggests that he became aware of the alleged injury during that May time period. Nevertheless, claimant does not argue that his time for giving notice should be enlarged to 75 days due to good cause. Respondent only admits it received notice that claimant was alleging his injury was work related on June 24, 2008.

No coworkers and no supervisors testified in support of claimant's allegation that he was working with pipe the morning of March 12, 2008, rather than driving a truck. Although claimant testified that his symptoms worsened in May and June 2008, he does not allege a series of accidents or a subsequent work-related injury or aggravation.

Because of the lack of corroborating testimony, the inconsistencies in the claimant's testimony and the inconsistencies in his histories of injury contained in the medical records, the ALJ found that claimant failed to prove he suffered personal injury by accident, lifting pipe, on March 12, 2008. The ALJ further found that claimant failed to prove injury by accident arising out of and in the course of his employment with respondent on March 12, 2008. In addition, the ALJ determined that claimant failed to give respondent timely notice of an accident. Having examined the entire record, the Board affirms and adopts the findings and conclusions of the ALJ.

CONCLUSION

Claimant has failed to sustain his burden of proving he suffered personal injury by an accident on March 12, 2008, that arose out of and in the course of his employment with respondent and failed to prove that he gave timely notice of the alleged accident to respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated April 12, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge